IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

WEDNESDAY, THE SIXTEENTH DAY OF FEBRUARY
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE K.C. BHANU

WRIT PETITION NO : 20672 of 2004

Between:

The Etikoppaka Sugar Factory Employees and Workers Union (Regd. No. 578182) Darlapudi, Visakhapatnam District, represented by its General Secretary Gaddam Ram Mohana Rao

..... PETITIONER

AND

1 Government of A.P. rep by its Secretary, Industries & Commerce (Sugar) Dept., Secretariat, Hyderabad.
2 The Director of Sugar and Cane Commissioner, Government of A.P. Hyderabad.
3 The Etikoppaka Co-op Sugar Factory Ltd. rep by its Managing Director Darlapudi, Visakhapatnam.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a writ, order or direction more particularly one in the nature of writ of Certiorari calling for the records relating to the G.O.Ms.No. 219 Industries and Commerce (Sugar) Dept. dt. 1-10-2004 on the file of the 1st respondent and quash the same duly declaring the same as ultra vires void, inoperative and violative of principles of natural justice.

Counsel for the Petitioner: MR.V.V.N.NARAYANA RAO

Counsel for the Respondents: MR.S.R.ASHOK

The Court at the admission stage made the following :

The Hon’ble Sri Justice

K.C. Bhanu

W.P. No. 20672 of 2004

O R D E R:

This writ petition is filed challenging G.O.Ms.No. 219 Industries and Commerce (Sugar) Department dated 1.10.2004 on the file of 1st respondent as illegal, ultra vires and violative of principles of natural justice.

The brief facts that are necessary for the disposal of the present writ petition may be stated as follows:

The petitioner, which is a trade union consisting of staff and workers of the 3rd respondent-Sugar Factory, filed the writ petition for not paying the bonus to its members from 1998 onwards till today. It is the case of the petitioner that despite earning substantial profits during the relevant years the 3rd respondent has avoided to pay the bonus to its employees from 1998 and therefore the employees of the petitioner filed W.P. 5721 of 2004 before this court and also filed WPMP 7445 of 2004 for interim direction wherein this court passed interim order as prayed for against the 3rd respondent. As the said order is not implemented, a contempt case is also filed. Thereafter the writ petition filed by the petitioner was allowed on 21.7.2004 directing the 3rd respondent to pay the minimum bonus to its employees from 1998 onwards. 1st respondent granted exemption for payment of bonus to the employees of the 3rd respondent establishment under Section 36 of the Payment of Bonus Act, 1965 vide G.O.Ms.No.219 dated 1.10.2004. The grievance of the petitioner is that while issuing the said G.O. the 1st respondent has not taken into consideration the financial position of the 3rd

respondent establishment and no notice and opportunity have been given to the employees before passing the impugned order to rebut the data furnished by the 3rd respondent and whatever data submitted by the 3rd respondent is factually incorrect. The 3rd respondent has paid the entire dues to its cane growers from 1998-99 onwards till today. The 3rd respondent unnecessarily spent huge lakhs of rupees on constructing godowns by demolishing the existing godowns. The 1st respondent has not applied its mind and simply granted exemption under Section 36 of the Act. Therefore, the petitioner prays to quash the same.

Respondents 1 and 2 filed counter affidavit stating that the 3rd respondent-factory has not earned profits during 1998-99 to 2003-2004 and there were accumulated losses. As the factory could not earn profits the bonus was not paid to the employees and workers of the 3rd respondent factory and as per the Government instructions the factory has paid productivity linked incentive to its employees for the years 1998-99 and 1999-2000 in lieu of bonus. Subsequently the sugar factory is involved in severe financial stringency due to various reasons. The factory is not in a position even to pay salaries to its employees and workers and cane payments to the cane growers. There is a power vested in the Government to exempt the 3rd respondent from payment of bonus and there are no grounds to quash the proceedings.

The 3rd respondent factory filed counter affidavit stating that due to varying factors in the market conditions it has been suffering substantial losses continuously. The petitioner could not sell the sugar produced by the industry on account of excessive production and indiscriminate imports of sugar from foreign countries. A peculiar situation has developed that levy sugar is not being lifted by the Governmental authorities and in order to pay cane price to sugar cane growers the 3rd respondent borrowed Rs.5.00 crores from A.P. State Cooperative Bank during the crushing season 2003-

2004 and Rs.1.00 crore from Visakha Cooperative Bank Limited and further amount of Rs.18.00 crores from District Cooperative Central Bank Limited and the 3rd respondent has to pay those arrears to various departments and duly considering all these aspects the Government granted exemption under Section 36 of the Act and there are absolutely no infirmities in the order passed by the Government. The said power can be exercised by the Government in respect of past period only. After considering the entire material on record including the recommendations made by the Director of Sugars, the Government of Andhra Pradesh granted exemption. The petitioner had knowledge of the factum of submission of proposals by the 3rd respondent seeking grant of exemption and if the petitioner had any material to counteract such proposal, it could have as well made over to the Government. But, for the reasons best known to it, the petitioner did not place any representation before the Government and allowed the Government to pass the order. Therefore it is not open to the petitioner to turn round and question the order of the Government on account of violation of principles of natural justice. Hence the 3rd respondent prays to dismiss the writ petition.

The petitioner filed reply affidavit stating that as per the audit accounts books etc. the 3rd respondent has not accumulated losses from 1998-99 onwards but is under net profits and if the net profit sharing of bonus is formulated it should be distributed to the workers and issuing the impugned G.O. with retrospective effect is nothing but taking away the benefit under the Act and hence the petitioner prays to allow the writ petition.

Learned counsel for the petitioner Sri V.V.N. Narayana Rao contended that without giving any notice the impugned order has been passed by the Government which cannot be passed because the vested rights accrued to the petitioner union were taken away by the impugned G.O. Therefore, they cannot be taken away retrospectively and to nullify the decision of this court the present

G.O. is issued. He further contended that the G.O. cannot be given retrospective effect and hence he prays to set aside the same.

Learned Government Pleader for respondents 1 and 2 contended that after considering the material on record and basing on the proposals of the 3rd respondent the 1st respondent has taken a decision and therefore it cannot be said that the said order is passed mechanically.

On the other hand, the learned senior counsel Sri S.R. Ashok, appearing for the 3rd respondent, contended that Section 36 of the Payment of Bonus Act, 1965 is silent about giving of opportunity; that the petitioner was having knowledge about the proposals sent by the 3rd respondent seeking exemption and nothing prevented them to put-forward their grievance before the 1st respondent. Therefore, the conduct of the petitioner amounts to waiver. The purpose and object of issuing a government order with retrospective effect considering all the circumstances cannot be held to be void since financial loss is a major factor to be determined and therefore there are no grounds to allow the writ petition.

The petitioner union filed W.P. 5721 of 2004 before this court for a direction to the respondents therein to pay the minimum bonus to the employees as provided under Section 10 of the Payment of Bonus Act. After considering the rival submissions, this court vide its order dated 21.7.2004 held:

“Accordingly the writ petition is allowed and the respondents are directed to pay the minimum bonus to the employees of the 2nd respondent-sugar factory as provided by Section 10 of the Act for accounting years 1998 onwards. In view of the peculiar facts and circumstances of the case and as the application for granting exemptions pending before the Government and also to enable the 2nd respondent to cope up with the funds for payment of the bonus under Section 10 of the Act, I am of the view that it is just and proper to grant some breathing time and accordingly

three months time is granted for payment of bonus to the employees of the 2nd respondent-sugar factory".

The said order has become final as no appeal is filed against the said order. From the above order it is clear that the employees of the petitioner union are entitled for payment of minimum bonus as provided under Section 10 of the Act. Thereafter, the impugned notification in G.O.Ms.No.219 dated 1.10.2004 has been issued exempting the 3rd respondent-sugar factory from the operation of all the provisions of Section 10 of the payment of Bonus Act. The said notification is under challenge on two grounds, 1) that there is violation of principles of natural justice and 2) that the exemption cannot be granted retrospectively.

It is not in dispute that the provisions of the Payment of Bonus Act are applicable to the 3rd respondent-sugar factory and all the employees are entitled to payment of bonus in accordance with the provisions of the Act. As per Section 10 of the Bonus Act, every employer shall be bound to pay to every employee in respect of accounting year commencing on in the year 1979 and in respect of every subsequent accounting year a minimum bonus which shall be 8.33% of the salary and wages earned by the wage earned employee during the accounting year. A Division Bench of this court i n **Tandava Cooperative Sugars Limited, Karmik Sankshema Sangh v. T.C.S.L**. held "*an analysis of the judgment referred to hereinabove clearly reveals that unless the Government issues notification exercising its power under Section 36 of the Act, the employer is bound to pay minimum bonus of 8.33% to its employees irrespective of the profits in its business as is provided under Section 10 of the Act*". It is further held "*the position as it stands is clear that the respondents herein cannot be permitted to deprive the employees of the respondent-factory of their legitimate right to receive a minimum bonus of 8.33% from its employer irrespective of the profits earned in its business*".

Therefore, the above decision is clear that the employer is bound to pay a minimum bonus of 8.33% to its employees irrespective of the profits unless the Government issues notification under Section 36 of the Act.

Learned counsel for the petitioner relied upon a decision i n **APSFDC Limited Employees Union v. Government of A.P.** wherein it is held:

> "From a plain reading of Section 36 of the Act, it is clear that the Government is bound to exercise its power whenever an application is made by an establishment for exemption and pass such order as it thinks fit giving reasons for the same. It is obligatory on the part of the Government to exercise its power only having regard to the financial position and other 'relevant circumstances' of the concerned establishment. The Government has no unlimited discretion either to refuse or grant exemption. A duty is cast on the Government to carefully examine the financial position and other relevant circumstances of the establishment concerned and decide as to whether the grant or refusal thereof is in the public interest or not. The Government is bound to record reasons for its decision. The Government is bound to decide the matter only on consideration of facts relevant to the provisions of the statute itself. It is bound to make a bona fide and pragmatic assessment of all the relevant factors before taking the decision of the matter. It is demonstrably clear from the provisions of Section 36 of the Act that any order, the Government may pass under Section 36 of the Act will result in serious civil consequences. Therefore, the matter has got to be considered objectively, strictly within the guidelines laid down by the Parliament in Section 36 itself. The reasons, on the basis of which the Government has formed its opinion, are required to be

disclosed".

From the perusal of the above decision it is clear that the Government order issued therein suffers from incurable legal infirmities as the Government has not followed the provisions of Section 36 of the Act. Section 36 of the Payment of Bonus Act reads "*if the appropriate Government having regard to the financial position and other relevant circumstances of any establishment or class of establishments is of the opinion that it will not be in public interest to apply all or any of the provisions of this act thereto, it may by notification in the official gazette exempt for such period as may be specified therein and subject to such conditions as it may think fit to exempt such establish or class of establishments from all or any of the provisions of this Act".*

But the learned counsel for the respondents contended that the petitioner is having knowledge about the proposals submitted by the 3rd respondent for grant of exemption under Section 36 of the Act by its letter dated 19.5.2004 and therefore nothing prevented the petitioner to approach the Government to put-forward the grievances if any and hence the order does not suffer from any violation of principles of natural justice.

No doubt Section 36 does not contemplate issuance of any notice before giving exemption but at the same time it is required to be noticed that since the order passed under Section 36 will result in serious civil consequences, the matter has to be considered objectively and strictly within the guidelines laid down in Section 36 itself. On the basis of which the Government formed its opinion is required to be disclosed. As seen from the impugned proceedings, the Government merely stating "*having regard to the financial position of the said factory is of the opinion that it will not be in public interest to apply the provisions of Section 10 of the said Act relating to payment of minimum bonus to the employees of the said factory*" exempted the provisions of the Payment of Bonus Act in public

interest for the years 1998-99 to 2003-04. The existence of relevant material is a pre-condition for formation of opinion by the Government. Considering the financial position of the factory cannot be said to be a subjective satisfaction of the Government. The order does not show net loss. So, I am of the considered opinion that the 1st respondent acted solely on one-sided date furnished by the 3rd respondent. The employees who are likely to be deprived of their minimum statutory bonus as per the Act would be the rival class of persons who are necessarily likely to be adversely affected if such exemption is granted to the establishment. The petitioner herein was not given any opportunity to rebut the data furnished by the 3rd respondent.

The contention that the petitioner-union knows about the proposals send by the 3rd re and therefore it can furnish the data cannot be accepted because it is for the 1st respondent to call for such date from the petitioner which is required before passing the impugned G.O. No doubt, Section 36 does not indicate that a prior notice should be given to the affected parties but when vested rights are being taken away, then, I am of the considered opinion, the 1st respondent ought to have notice. Admittedly no such notice was given before passing the impugned notification.

The next point is that whether the Government is competent to pass the impugned order taking away the vested right retrospectively. On this aspect, learned counsel for the petitioner relied upon a decision of the apex court in **State of Tamil Nadu v. K. Sabanayagam** wherein their Lordships held:

> "While exercising that power the data which would be available from the establishment would obviously be one-sided data in support of its claim for exemption. The employees who are likely to be deprived of their minimum statutory bonus as per the Act would be the rival class of persons who are necessarily likely to be adversely affected if such exemption is granted to the

> establishment on the basis of the one-sided data in support of its claim. Therefore, in the absence of any rebuttal data furnished by the other side which is likely to be affected by such an exercise, namely, the employees the opinion arrived at by the appropriate Government, purely based on the one sided version and data submitted by the establishment or a class of establishments for claiming exemption, would be a truncated opinion which would necessarily not amount to an opinion on all relevant facts placed before it for and against the exercise of such power of exemption qua a given establishment or a class of establishments".

Therefore, from the above decision it is clear that the opinion formed by the Government basing on one-sided data does not amount to an opinion on all relevant facts, but the question of giving exemption under Section 36 of the Payment of Bonus Act is left open. In the aforesaid decision, what procedure should be followed by the appropriate Government in such case for grant of exemption under Section 36 of the Act has been summarized as follows:

"1. When such applications are received by the appropriate Government which necessarily have to be supported by relevant data by the claimants, the receipt of such applications has to be brought to the notice of the employees likely to be affected by grant of such applications and for that purpose notices can be suitably got affixed by the appropriate Government on the notice boards of the concerns or factory premises of the establishments where the workmen are working mentioning the dates on which such applications are received and the grounds on which such exemptions are claimed under such applications.

2. Suitable public notice in newspapers having circulation in the area of operation of such establishments can be got published and for that purpose suitable expenses can be required to

be reimbursed by the claimants to the appropriate Government.

3. The concerned employees through their representative unions may, under these circumstances, be permitted to file their written representations with relevant data for rebutting the material furnished by the claimants so that the rival version put forward by the employees also will become available to the appropriate Government before it forms its opinion. For that purpose the public notice and the notice to be affixed on the notice boards of the concerns should indicate as to within what reasonable time such representations may be furnished with relevant data by the representative unions of the employees concerned.

4. Though it is not necessary for the appropriate Government before forming its opinion under Section 36 of the Act on the basis of the data furnished by the rival parties to give any personal hearing either to the claimant-establishment or to the representative union of the employees. It may be still open in appropriate cases for the Government, if so thought fit, to give opportunity of personal hearing to the representatives of the establishments as well as of the employees if any elucidation is required in this connection.

5. For making the aforesaid exercise effective if the concerned employees through their representative unions seek an opportunity to look into the material supplied by the establishments in support of their claims for exemption, inspection of such material can be made available to the unions of employees to enable them to file their representations and to furnish the data in rebuttal for opposing such claims.

6. Strict time schedule can be fixed by the appropriate Government within which the entire exercise can get completed so that the proceedings may not drag on for indefinite number of months. Under the circumstances, therefore, it would always be open to the appropriate Government on receipt of such applications for exemption under Section 36 to fix the time schedule of four to six

weeks from the date of publication of such notices about receipt of applications for exemption as aforesaid within which the employees through their representative unions, if so advised, may file their representations and within the same time they may be given an opportunity, if so required, to have inspection of the material furnished by the claimant-establishments in support of their claim applications. Once such time schedule is followed no written representations would ultimately be required to be entertained after the time limit fixed for receipt of such representations from the employees' unions likely to be affected by the grant of such exemption so that within a short time thereafter as expeditiously as possible the appropriate Government can form its opinion, if any, and complete the exercise if it is of the opinion tht all the requisite conditions for exercise of the power under Section 36 of the Act have been found to have existed qua the claimant-establishment or class of establishments for an appropriate period for which such exemption is to be granted".

Following the above judgment, since no rebuttal data is furnished by the respondents and no opportunity was given to the petitioner, the impugned proceedings are liable to be quashed.

Learned counsel for the 3rd respondent, however, contended that the petitioner despite having knowledge of pendency of the matter before the Government did not put-forward its grievance which amounts to waiver. From the conduct of the petitioner, it cannot be said that the petitioner waived its known right.

Learned counsel for the respondent No.3 relied upon a decision in **Trimbak v. Assaram** wherein it is held:

> "In this connection it is relevant to distinguish between an existing right and a vested right. Where a statute operates in future it cannot be said to be retrospective merely because within the sweep of its operation all existing rights are included. As observed by Buckley, L.J. in West v.

Gwynne, 1911-2 Ch 1 at pp.11, 12, retrospective operation is one matter and interference with existing rights is another".

The above decision has no application since the notification is issued retrospectively taking away the existing rights, transformed into vested rights, of the petitioner and the impugned proceedings cannot be said to be based upon objective facts furnished by the 3rd respondent. Even the 3rd respondent has not produced the copy of the letter seeking exemption from the Government. Therefore, the impugned G.O. suffers from legal infirmities and the same is quashed accordingly. However, this order does not preclude the respondents 1 and 2 in taking appropriate decision in calling for all the relevant data from both the parties and by giving an opportunity to the petitioner and issue notification under Section 36 of the Act exempting the payment of bonus.

The writ petition is allowed accordingly.

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K.C. Bhanu, J.

Date: 16--02—2005.

MVB.

..... REGISTRAR

// TRUE COPY //

SECTION OFFICER

To

1 The Secretary, Government of A.P. Industries & Commerce (Sugar) Dept., Secretariat, Hyderabad.
2 The Director of Sugar and Cane Commissioner, Government of A.P. Hyderabad.
3 The Managing Director, Etikoppaka Co-op Sugar Factory Ltd. Darlapudi, Visakhapatnam.

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